IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. [redacted] 49

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

*Appellants Cross-Appellees,*

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California; and STANLEY MOSK, Attorney General of the State of California,

*Appellees Cross-Appellants.*

**Cross-Appeal from the United States District Court for the Northern District of California, Northern Division**

## CROSS-APPELLANTS' JURISDICTIONAL STATEMENT

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 557

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation,

*Appellants Cross-Appellees,*

vs.

CHARLES PAUL, Director of the Department of Agriculture of the State of California; EDMUND G. BROWN, Governor of the State of California; and STANLEY MOSK, Attorney General of the State of California,

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## CROSS-APPELLANTS' JURISDICTIONAL STATEMENT

### JURISDICTIONAL STATEMENT

Appellees and cross-appellants Charles Paul, Edmund G. Brown, and Stanley Mosk, hereinafter denoted appellees, cross-appeal to the Supreme Court of the United States, as follows:

From that portion of the judgment entered herein on September 22, 1961, which provides: "3. The action is dismissed on the merits;" Appendix p. 38.

## OPINION BELOW

The opinion of the District Court for the Northern District of California, Northern Division, is printed in Appendix A, and is reported in *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 197 F. Supp. 780 (1961). Copies of the Order Re Plaintiffs' Motion to Substitute and Ruling on Evidenciary Matters, filed September 21, 1961; Findings of Fact and Conclusions of Law, filed September 21, 1961; and the Judgment, entered September 22, 1961, are attached hereto as Appendix A.

## JURISDICTION

This action was brought under 28 U.S.C. 1331 and 1337 to enjoin enforcement of California Agricultural Code Section 792 as unconstitutional and in conflict with federal statute. Final judgment dismissing appellants' action was entered in the district court on September 22, 1961, and appellees' direct cross-appeal was timely filed in that court on November 3, 1961. 28 U.S.C. Sec. 2101(b).

Appellees will assert in their Motion to Dismiss, filed separately herein, that this court lacks jurisdiction of the case under 28 U.S.C. Sec. 1253. However, the Court may find that the judgment of the district court dismissing appellants' action falls within the appellate jurisdiction of this court. In this event ap-

pellees pray that the Court review the entire case and should correct the error of the district court in dismissing the action on the merits, instead of dismissing for lack of jurisdiction.

## QUESTIONS PRESENTED

1. Whether the district court erred in dismissing the action on the merits instead of dismissing the action for want of jurisdiction.

2. Whether the district court erred in failing to dismiss the action as barred by the Eleventh Amendment to the United States Constitution.

3. Whether the district court erred in failing to dismiss for failure of appellants to establish a justiciable controversy.

## STATUTES INVOLVED

The pertinent provisions of the California Statutes (Calif. Agr. Code, secs. 784, 785, 785.6, 792, 831) and of the California Regulations (3 Calif. Adm. C., secs. 1366.2 and 1397.6) are attached hereto as Appendix B.

## STATEMENT

A district court convened pursuant to 28 U.S.C., secs. 2281 and 2284, dismissed appellants' action on the merits, after trial, by judgment entered September 22, 1961. Appellants' complaint had sought declaratory judgment and an injunction restraining the enforcement of Section 792, California Agricultural Code, on the ground of its invalidity under the federal

Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, and as unconstitutional under the Commerce and Equal Protection Clauses of the United States Constitution.

Section 792 of the California Agricultural Code is part of a comprehensive statutory program establishing quality and maturity standards for a large number of agricultural products (see California Agric. Code, Div. 5, "Standardization," Secs. 751-1149.9, 3 Calif. Adm. Code, Secs. 1366-1478). Section 792 prescribed standards for avocados. This section provides in relevant part: "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 percent of oil, by weight of the avocado excluding the skin and seed." This 8 percent oil content standard for avocados was enacted into law by the California Legislature in 1925. Calif. Stats. 1925, Ch. 350, p. 633.

The district court found that (1) appellants neither suffered nor were threatened with irreparable injury and that appellants' evidence failed to establish a case within the equity jurisdiction of the district court, (2) that Section 792, Agricultural Code, is consistent with the provisions of the federal Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, and with the marketing regulations for avocados grown in South Florida issued thereunder, 7 C.F.R., Pt. 969, and (3) that Section 792, Agricultural Code, is consistent with the Commerce and Equal Protection clauses of the United States Constitution. Appendix p. 33.

In its Memorandum and Order, filed July 12, 1961, the district court stated, that while the appellants' evidence failed to establish a case within the equity jurisdiction of the district court, it was compelled to adjudicate the merits because of the language in the earlier remand of the Court. *Florida Lime and Avocado Growers* v. *Jacobsen,* 362 U.S. 73, 86 (1960). Appendix p. 21.

At the trial before the three-judge district court held February 7 and 8, 1961, appellants' case consisted of the testimony of Paul Louis Harding, Supervisory Plant Physiologist, United States Department of Agriculture. (Tr. 3.)[1] Mr. Harding testified to the horticultural nature of avocados grown in Florida and described the experimental work on avocados performed by the United States Department of Agriculture. (Tr. 2-97.)

Appellants at the trial also offered in evidence en masse the transcripts of depositions of five witnesses, together with the twenty-two exhibits attached thereto. (Tr. 29.) Upon appellees' objection, the court reserved decision on their admissibility. (Tr. 29.) After considering appellees' written objections, the court ruled that the depositions and exhibits were inadmissible in evidence. Appendix p. 31; Dkt. #110, pp. 12-50.[2] The three-judge court excluded Exhibit 23 for identification from evidence and reserved ruling on the

[1] Notation "Tr. _____" refers to partial reporter's transcript of the hearing February 7 and 8, 1961.

[2] Notation "Dkt. # _____" refers to the number marked in red on each document in the original record on appeal.

admissibility of appellants' exhibits for identification 24, 25 and 26. (Tr. 26, 69.) After considering appellees' written objections, the court thereafter ruled Exhibits 24, 25 and 26 to be inadmissible in evidence. Appendix p. 31; Dkt. #110, pp. 42-46. Appellants have not challenged the correctness of these evidenciary rulings in the Questions Presented in either their Notice of Appeal or in their Jurisdictional Statement. Dkt. #128; Appellants' Jurisdictional Statement, pp. 4 and 5.

The Honorable Homer T. Bone, United States Circuit Judge, Louis E. Goodman, United States District Judge, and Sherrill Halbert, United States District Judge, heard the evidence presented by the parties February 7 and 8, 1961, and signed the Memorandum Opinion of the court, filed July 12, 1961, which directed that appellees prepare findings, a form of judgment, and all other documents necessary to dispose of the action. Appendix p. 30. However, District Judge Louis E. Goodman died September 15, 1961, and was unable to sign the "Order Re Plaintiffs' Motion to Substitute and Ruling on Evidentiary Matters" and the "Findings of Fact and Conclusion of Law" filed September 21, 1961, nor the "Judgment" entered September 22, 1961. These Orders, Findings and Judgment were signed by United States Circuit Judge Homer T. Bone and by United States District Judge Sherrill Halbert. Appendix pp. 31-39.

Appellants did not seek leave to amend their complaint, nor did they petition for rehearing following the dismissal in the district court.

## THE QUESTIONS ARE SUBSTANTIAL

### I. The District Court Should Have Dismissed Appellants' Action for Want of Equity Jurisdiction.

Appellants' complaint alleged, and appellees' answers denied, that the appellees, or their agents, consistently barred the sale of appellants' avocados in California for failure uniformly to contain not less than 8 percent oil by weight, resulting in denial to appellants of access to the California markets and forcing the reshipment of the avocados to other adjoining states for sale, to the irreparable loss to appellants. Complaint, Dkt. #1; Answers, Dkt. #72 and #123. At the trial heard before the three-judge district court on February 7 and 8, 1961, appellants' evidence of injury was excluded from evidence, and was considered as an offer of proof only.[3] Appendix p. 31.

The district court in its opinion stated that it would have declined its discretionary equitable jurisdiction

[3] The various grounds for excluding the depositions and exhibits from evidence are discussed in Appellees' Trial Brief at pages 12 to 50. Dkt. #110, e.g. *Los Angeles D. & Mtg. Exch.* v. *Securities & E. Comm.*, (9 Cir.), 264 F. 2d 199 (1959). Should the question of admissibility be reached, the offer of proof may only be considered for the purpose of determining whether error was committed to the prejudice of appellants in excluding this material from evidence. *Idaho and Oregon Land Co.* v. *Bradbury*, 132 U.S. 509, 518 (1889). Appellees have reserved the right to present rebuttal evidence at any further hearing in the trial court. (Tr. 190-191; Appendix p. 31.)

but for the language in the judgment of this court directing that the controversy between the parties be "determined on the merits." *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 85-86 (1960); Appendix p. 21. Analysis of the previous appeal, though, discloses that the question of equity jurisdiction remained open to the district court for decision.

Appellees originally had moved in the trial court that appellants' action be dismissed on several grounds. The principal ground for the motion was that appellants had made an insufficient showing of injury to warrant the invocation of the district court's discretionary power to interfere with a state's enforcement in state courts of its own laws. After hearing oral argument, the district court on December 17, 1958, entered an order dismissing the complaint on the ground that it had no jurisdiction to decide the case because of the absence of a justiciable case or controversy within the meaning of Article III of the United States Constitution. In its order dismissing the action, the district court made it clear that it had no jurisdiction to hear the case, and could not therefore rule on the grounds presented in the motion to dismiss. The district court stated: "Since this case must be dismissed because of a lack of jurisdiction, it is unnecessary to consider defendants' motions to dismiss." *Florida Lime & Avocado Growers* v. *Jacobsen*, 169 F. Supp. 774, 776 (1958). Since the district court did not rule on the issue of equity jurisdiction raised by the motion to dismiss, and appellants did not raise the

issue in the Notice of Appeal or in their Jurisdictional Statement on Appeal, the issue of lack of equity jurisdiction was not considered on the previous appeal by this court. Appellants' Jurisdictional Statement, *Florida Lime Growers* v. *Jacobsen*, October Term 1959, #49, p. 6. This court in its opinion carefully observed this distinction, saying that the allegations of the appellants' complaint [4] were sufficient to show that "there is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the merits." *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 85-86 (1960). In short, the question whether appellants have shown facts establishing a case within the equity jurisdiction of the district court was part of the dispute between the parties and was still before that court after remand from this court. The district court in its findings entered September 21, 1961, found that "Plaintiffs' [appellants'] have neither suffered nor been threatened with irreparable injury and that plaintiffs' [appellants'] evidence fails to establish a case within the equity jurisdiction of this [District] Court." Appendix p. 36. Having found a lack of equity jurisdiction, the district court should not have reached the constitutional issues raised in appellants' complaint. *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 97 (1935);

[4] The allegations of appellants' complaint were accepted as true by appellee Jacobsen for the purposes of his motion to dismiss. Appellee's Brief, *Florida Lime Growers* v. *Jacobsen*, Oct. Term 1959, #49, p. 7.

*Douglas* v. *Jeannette,* 319 U.S. 157 (1943). By doing so, the district court decided a constitutional question when it was not necessary to do so, permitted a constitutional question to be raised by a litigant who was able to show no interest in its outcome, and decided a constitutional question, which upon the facts, was not presented for decision. The district court thereby erred in departing from the federal judicial policy of strict necessity in disposing of constitutional issues. *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568-571 (1947).

## II. Appellants' Action Is Barred by the Eleventh Amendment to the United States Constitution.

There is no evidence in the record showing that either of the appellees Charles Paul, Director of Agriculture, Edmund G. Brown, Governor of California, or Stanley Mosk, Attorney General of California, nor any of their predecessors, have taken any action or threatened to take any action detrimental to appellants.

Appellees, as individuals, therefore have no personal interest in the subject-matter of the suit, and defend only as representing the state. The relief sought is against the appellees, not in their individual, but in their representative capacities as the executive officers of the State of California. The prayer in appellants' complaint is that appellees be restrained from proceeding in the state courts to enforce the state Agricultural Code. As a state can act only by its officers, an order restraining those officers from tak-

ing any steps by means of judicial proceedings to enforce the state Agricultural Code is one that restrains the state itself. The suit therefore is as much against the state as if the state were named as a party defendant on the record. While ". . . Congress has authority to direct the conduct of federal officers in proceedings brought . . . against them as such and may ordain that they may . . . be sued as representatives of the United States and stand in judgment on its behalf . . ., Congress is not so empowered as to state officers." *Ex parte La Prade*, 289 U.S. 444, 458 (1933). In the absence of proof of action, or the threat of action, hostile to appellants' interests, the appellees are not stripped of their representative character, and the suit becomes one against the state. *In re Ayers*, 123 U.S. 443, 505-506 (1887); *Ex parte Young*, 209 U.S. 123, 159-160 (1908). No threat of interference by appellees with rights of these appellants appears beyond that implied by the existence of the California statute and regulations. Appellants' action is solely to test the constitutionality of the state statute, in the enforcement of which appellees will act only by formal judicial proceedings in the courts of the state from which review may be obtained in this court in appropriate cases. While convenient to appellants, it is a mode of determining questions of constitutional law ". . . which cannot be applied to the state of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private

persons." *Fitts* v. *McGhee*, 172 U.S. 516, 530 (1899). Appellants' quarrel, therefore, is with the statute book, not with appellees, and appellants' action is barred by the Eleventh Amendment to the United States Constitution.[5] California cannot be interfered with in the performance of the public administration and, as it cannot be made a party, the action must fail.

### III. No Justiciable Controversy Exists.

Appellant's complaint does allege facts constituting a justiciable controversy. This court so held on the previous appeal of this case. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 85-86 (1960). But appellants failed to prove these allegations. Allegations in a complaint which are not supported in fact do not create a justiciable controversy. *Poe* v. *Ullman*, 367 U.S. 497, 501-502 (1961), appeal from state court judgment dismissed.

Allegedly there is a controversy over the application of California's 8 percent oil standard to appellants' avocados. There is no evidence, however, that any of appellants' shipments of avocados to California were ever rejected as not meeting the 8 percent oil standard. Nor is there any evidence that appellants' have refrained from shipping avocados to California because of the 8 percent oil standard. The judicial power does not include the rendering of advisory opinions on hypothetical situations. *United Public*

[5] Amendment Eleven, United States Constitution, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of United States by citizens of another state. . . ."

*Workers* v. *Mitchell*, 330 U.S. 75, 86-91 (1947), appeal from United States District Court, judgment dismissing action affirmed; *Poe* v. *Ullman*, 367 U.S. 497, 501-502 (1961).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below be vacated with directions that the action be dismissed for want of jurisdiction.

Respectfully submitted,

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December, 1961

## APPENDIX A

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

## MEMORANDUM AND ORDER

### Filed July 12, 1961

Plaintiffs instituted this suit against certain officials[1] of the State of California. Plaintiffs seek an injunction against the enforcement of certain portions of the California Agricultural Code, which plaintiffs contend to be in conflict with the Commerce and Equal Protection Clauses of the Federal Constitution, and with the Federal Agricultural Marketing Agreement Act of 1937 (Title 7 U.S.C. §601 *et seq.*) and Florida Avocado Order No. 69 issued under the said Act.

The plaintiffs are Florida growers and packers of avocados, engaged in the interstate marketing of their product. They ship avocados into California, among other states. California has a law (California Agricultural Code, § 792) which requires avocados to contain not less than 8% oil by weight, excluding skin and seed, before they can be sold for human consumption. Plaintiffs' object in bringing this suit is to prevent the future application of this law to avocados which they wish to market in California.

This Court initially dismissed the action for want of a present, actual case or controversy (*Florida Lime*

[1] The motion to substitute Charles Paul, Director of Agriculture of the State of California, for defendant Warne, his predecessor in that office, will be granted (Federal Rules of Civil Procedure, Rule 25(d)).

*& Avocado Growers vs. Jacobsen*, 169 F.Supp. 774). The United States Supreme Court reversed this decision, holding that there is an existing dispute amounting to a justiciable controversy which plaintiffs are entitled to have determined on the merits (*Florida Lime & Avocado Growers vs. Jacobsen*, 362 U.S. 73).

The case has now been heard by a three-judge Court, pursuant to the provisions of Title 28 U.S.C. §§ 2281 and 2284. The evidence has been heard, with the rulings on certain objections by defendants having been reserved. Both sides have argued and briefed their positions, and the case is submitted to the Court for its determination.

The Court will not, at this time, rule on the objections made by defendants to plaintiffs' evidence on which the Court has reserved its ruling. The exhibits and depositions are very voluminous, as are the objections to them. We will assume, *arguendo*, that the exhibits and depositions offered by plaintiffs are all admissible. Likewise, we do not consider it necessary at this time to hear the evidence which defendants propose to offer in rebuttal to plaintiffs' exhibit 16 for identification.[2]

## THE FACTS

California is the major producer of avocados in the United States. Virtually all of the rest of the avocados produced in the United States are raised in Florida. California grows principally avocados of Mexican origin, of which there are a number of differing individual varieties. Florida grows principally

[2] It is recognized that the right had been reserved to defendants to introduce such evidence at a further hearing, if necessary (See: pp. 190-191 of the trial transcript). We are of the view that such evidence is not necessary.

avocados of various "hybrid" varieties. About 12% of Florida's production consists of West Indian varieties. These are declining in importance, owing to poor shipping qualities, short shelf life and the susceptibility of the trees to freezing.

In 1925, practically all of the avocados produced in the United States came from California.[3] In that year, California adopted the requirement that all avocados marketed in this State contain at least 8% oil by weight, excluding the skin and seed. There was then, and still is, a body of respectable scientific opinion to the effect that the oil content of avocados in the hard state is the best indicator of maturity.

Avocados are customarily picked and marketed in a hard state. After purchase by the consumer, they are allowed to soften and ripen. If the avocados are picked while immature, they shrivel up and become useless when they soften. They become rubbery and unpalatable, with an unpleasant aftertaste. If they are picked when mature, they ripen while softening, and become palatable and desirable (to those who like them).

It is not simple or easy to tell whether an avocado which has just been picked, in a hard state, is, or is not, mature. A person of great experience can make a well educated guess as to whether or not such an avocado is mature, but the only sure test is to let it ripen and eat it.

There is a temptation on the part of growers to rush immature avocados to the market at the start of the season, when mature avocados are scarce and

[3] Florida's current high production of avocados results from heavy plantings which began in or about 1940. The trees then planted did not bear fruit until eight or ten years after being planted.

the price is high. The ordinary retailer and consumer do not realize that the avocados are immature until after they have purchased the fruit and allowed it to soften. The marketing of such avocados cheats the consumer, and it has a bad effect upon retailers and producers as a whole, since it increases future sales resistance.

To prevent the marketing of immature avocados, it is desirable to establish standards by which one can tell which avocados are immature, at the time that they are picked. There is expert opinion to the effect that the best standard to be used for such purpose is the percentage of oil in the fruit. Other expert opinion rejects this yardstick. It seems to be conceded by all that there is no better physical test than oil content by which to judge the maturity of the hard fruit by itself (other than to use the time-consuming method of letting it ripen and tasting it). Size and appearance are possible tests, but are not reliable. There is a body of expert opinion which holds that the best test of maturity is to establish picking dates for the fruit. The test used for purposes of the Florida Avocado Order is based upon picking dates.

The picking date method works as follows: For each variety of avocado in a particular production area, A, B and C dates are promulgated on the basis of past experience. No avocados of a particular variety may be picked until the A date for that variety. On and after the A date, fruit of a certain size and weight may be picked and shipped. On and after the B date, fruit of a smaller size and weight may be picked and shipped. On and after the C date, all restrictions of size and weight are removed.

The fruit growing on different trees of the same varieties matures at different times, depending on the

age of the trees, the weather, soil conditions, etc. The fruit upon a particular tree does not all mature at the same time. Differences of size and weight are of assistance in picking the mature from the immature fruit which has all been picked from the same tree, but they are not infallible guides. The picking date method, then, inevitably must let some immature fruit go to market, or keep some mature fruit off the market, or both.

Mexican varieties of avocados contain (generally speaking) the highest oil content of any varieties, when mature. Hybrid varieties attain the next highest oil percentages, and West Indian the lowest. Hybrid varieties generally attain oil content in excess of 8% if left on the trees long enough, but they do not necessarily attain such an oil content by the time that they may be marketed under the Florida Avocado Order. They are mature enough to be acceptable prior to the time that they reach that content, according to plaintiffs' witnesses. West Indian varieties do not attain an 8% oil content until they are past their prime.

California is the State of greatest consumption of avocados. In 1955-1956, California produced about two-thirds of the avocados consumed in the United States, and consumed over two-thirds of its own production, in addition to being a prime market for Florida avocados.

Plaintiffs have made fairly sizeable shipments of avocados to California in the past. Over 95% of them have passed the 8% oil content test. The other shipments have mostly been reshipped to other western states, although it is permissible under the California system to recondition shipments by removing the most

immature avocados in the hope of passing the test. The difficulty here appears to be the lack of external indicia of maturity or oil content. Plaintiffs' monetary losses as a result of the rejected shipments are not clearly established, but at most do not appear to be over two or three thousand dollars. Plaintiffs' shipments furnish proof that the California test does not *per se* bar Florida avocados from the California market.

Plaintiffs offered testimony to the effect that there are wide variations in oil content among avocados picked from the same tree, but that tasters could not pick out the high oil avocados by taste.[4] Defendants offered testimony to the effect that the oil test was a good test of maturity, and was the best test available. In our opinion, the testimony on behalf of the defendants, under all of the circumstances, is more convincing and entitled to greater weight.

Dr. Harding (plaintiffs' witness) stated that an oil content test might make a satisfactory test of maturity, if the percentage required were set independently for different varieties. No physical test (or picking date test) is perfect, but this Court is convinced that the most satisfactory physical test for the maturity of avocados is some sort of oil content test.

[4] It was not explained how plaintiffs' witnesses surmounted the inherent difficulties of such a test. The oil test is ordinarily made when the fruit is hard. It ordinarily involves the destruction of the fruit. Even if only half of an individual avocado were tested, the other half would not ripen normally. If the oil test were made on soft fruit, it would not conform to the California test, and there would be a danger of a biased sampling of fruit (That is, the test might be made only on fruit which had given physical indications during softening that it was mature.).

## EQUITABLE JURISDICTION

A Court of equity has a certain discretion as to whether it should exercise its equitable jurisdiction in any particular case. Defendants argue that plaintiffs have made no showing of threatened irreparable damage to them, such as would justify the issuance of an injunction suspending the enforcement of the laws of the State of California.[5] If the instant case were before this Court for the first time, the Court would decline to take equitable jurisdiction, on the showing made by plaintiffs (See: *Watson vs. Buck*, 313 U.S. 387; *A.F. of L. vs. Watson*, 327 U.S. 582).

If the Court were required to take equitable jurisdiction of the instant case, coming before this Court for the first time, it might well be advisable for the Court to retain jurisdiction of the case, pending an authoritative interpretation of the California law by the California Courts, which might be expected to result from the declaratory judgment proceeding which defendants have now brought against plaintiffs in the Superior Court of the State of California, in and for the County of Sacramento.[6] (See: *A.F. of L. vs. Watson, supra*).

This case is now before this Court, however, with a mandate from the United States Supreme Court, directing this Court to conduct further proceedings consistent with the opinion of the Supreme Court. In that opinion, it is stated that plaintiffs herein are entitled to have this controversy decided upon the merits. This Court concludes, therefore, that in the

[5] For some discussion of the delicacy of the exercise of such equitable power, see the material in footnote 5 of *Florida Lime & Avocado Growers vs. Jacobsen, supra*, at 362 U.S. 77.

[6] Case No. 125826, in the records of that Court.

instant case this Court has no discretion to decline equitable jurisdiction or to retain jurisdiction while awaiting State Court decision.

## THE MERITS OF THE CONTROVERSY

In the remainder of this opinion, we will consider, first, the Constitutional validity of the California law (A) in relation to the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, and (B) in relation to the Commerce Clause of the Federal Constitution. Then we will consider the question of whether the California law is in conflict with Federal laws or regulations.

In considering these questions, one must bear in mind that the burden of proof is upon plaintiffs herein to establish all the elements of their case by a preponderance of the evidence (31 C.J.S. pp. 713-714; *O'Brien vs. Equitable Society*, 212 F.2d 383; and See: *United States vs. Denver & R. G. Ry. Co.*, 191 U.S. 84; *Northern P. Ry. Co. vs. Lewis*, 162 U.S. 366; and *Morse vs. Fields*, 127 F.Supp. 63).

Moreover, in discussing Due Process limitations on the legislative power of the State of California, it must be noted that it is not enough for plaintiffs simply to establish that the legislation in question is out of harmony with a particular school of thought (*Williamson vs. Lee Optical Co.*, 348 U.S. 483). They must go beyond that. If it should be found that there is a respectable body of opinion in the light of which the enactment is reasonable, then it is for the Legislature, not this Court, to hold the balance between two conflicting schools of thought, and to decide which of them preponderates.

## CONSTITUTIONALITY OF THE CALIFORNIA LAW

### A. Equal Protection

Plaintiffs contend that the California 8% oil content test is arbitrary and unreasonable, and in violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

The Equal Protection Clause does not require perfection in legislative classification (See: *Phillips Chemical Co. vs. Dumas School District,* 361 U.S. 376). It is not enough that a classification by State law is discriminatory; it must be arbitrary and unreasonable before the Equal Protection Clause may be invoked to strike it down (*Allied Stores of Ohio vs. Bowers,* 358 U.S. 522 and *Borden's Co. vs. Ten Eyck,* 297 U.S. 251). It is for the Legislature, not the Courts, to write the laws. The people, if the Legislature commits abuses, have their remedy at the polls (*Williamson vs. Lee Optical Co., supra*).

It must be conceded that the 8% oil content requirement has worked effectively to bar immature avocados from the California markets. It is clearly established that an oil content test is the best available physical test for maturity. The only real issue is whether California must establish different percentages of required oil content for different kinds of avocados. There are hundreds of varieties of avocados. If each is to have its own required oil content, it is almost inevitable that the regulation must in time come under the control of the producers. The California Legislature cannot be expected to establish, after considered deliberation, hundreds of standards. If two or three categories are established, it will not always be an easy matter to decide in which category a particular variety may belong. These difficulties offer reasonable

support for the decision of the State of California to enact a single uniform standard. This is perfectly proper for "not only the final purpose of the law must be considered, but the means of its administration" (*St. John vs. New York*, 201 U.S. 633).

The police powers of California might reasonably be applied to insure a minimum oil content of the avocados for the sake of the higher nutritional value of the avocado, even if there were no issue of the maturity of the fruit. Legislation imposing a minimum butterfat content requirement on milk sold for human consumption has been customary in this country for many years (See: *St. John vs. New York, supra*). Such legislation disregards the fact that different breeds of cattle naturally produce different amounts of butterfat in their milk. It imposes a uniform requirement on all milk sold for human consumption, whether from Jersey or Holstein cows. There is no good reason why a similar requirement cannot be imposed on all avocados sold for human consumption. The general consuming public has traditionally given best acceptance to the richer kinds of milk. A requirement of similar richness for avocados would appear to be reasonable.[7]

Granting the possibility of a better law than the one devised by the California Legislative authorities, that does not require a finding that the law which *has* been passed is unconstitutional. The test is whether it is unreasonable and arbitrary. We hold that it is not.

[7] The State of California, which imposes the 8% oil content requirement, seems to have extremely good consumer acceptance of avocados. In 1955-1956, with less than a tenth of the Nation's population, the people of California consumed approximately half of the avocados consumed in the United States. This may be due to other factors than the fact that California consumers can rely on getting 8% oil. But it may be largely due to that fact.

## B. Interstate Commerce

It is patent that the California law is designed to prevent the marketing of immature avocados for human consumption in California. Such an enactment is not automatically invalidated because some of the avocados in question move into the State in interstate commerce (See: *Milk Board vs. Eisenberg Co.*, 306 U.S. 346; *Simpson vs. Shepard*, 230 U.S. 352). It is competent for a state to adopt protective measures for the health, safety, morals and welfare of its people, although interstate commerce may incidentally be involved (*Simpson vs. Shepard, supra*; *Mintz vs. Baldwin*, 289 U.S. 346). State legislation, based on police power, which does not discriminate against interstate commerce is not in conflict with the Commerce Clause (*Huron Cement Co. vs. Detroit*, 362 U.S. 440).

The question of whether the California law discriminates against interstate commerce is more difficult. It is clearly established that the law complained of was passed for a valid police purpose, without thought at the time of its passage of discriminating against Florida avocados. Florida avocados were of no commercial importance at the time that California adopted the 8% oil content requirement. It is admitted that there is no discrimination in the enforcement of the law. The only question is whether the 8% oil content requirement is inherently discriminatory against interstate commerce in the circumstances which now exist.

Some of the varieties of avocados grown in Florida cannot with commercial practicability meet the 8% requirement. These are the West Indian varieties. The bulk of West Indian avocados grown in Florida are Waldins, which do attain 8% oil content, but

are practically unmarketable at that time. The West Indian avocados, however, are difficult to market in distant states at any stage in their development, due to poor shipping qualities and short shelf life. Interference with the marketing of West Indian avocados in California is, for all practical purposes, within the maxim of *de minimis non curat lex.*

The West Indian varieties, actually, are discriminated against because of their qualities, not because they are shipped in interstate commerce. Avocados of the West Indian varieties are not as rich as the fruit of the varieties which do meet the 8% requirement. The application of the 8% requirement in California, ever since 1925, has naturally prevented the commercial development in this State of any varieties which cannot meet the requirement. As proof that there is no discrimination against interstate commerce as such, we see that the overwhelming majority of the shipments of avocados made by plaintiffs to this State have been marketed successfully after passing the California test.

Looking at the testimony of plaintiff's witness, Dr. Harding, we see that the hybrid avocados may be "acceptable," but not necessarily in "prime condition," before they reach the 8% oil requirement. Plaintiffs want to market them before they reach prime condition, in order to get the high prices which prevail at the start of the season. This is the very sort of practice which the California law was enacted to prevent. California producers may no longer jump the gun in this fashion. It is not discriminatory treatment, but equality of treatemnt, of which plaintiffs seem to complain.

We hold, then, that the California 8% oil requirement is not unconstitutional.

## ALLEGED CONFLICT BETWEEN STATE AND FEDERAL LAW

The remaining question for the court is whether the California 8% oil requirement must give way in the face of Florida Avocado Order No. 69, which was issued under the authority of the Federal Agricultural Marketing Agreement Act of 1937.

The Federal law attempts to prevent the marketing of immature avocados by Florida producers by an application of the picking date method of determining maturity. The Federal law says that Florida producers may not market their avocados unless they are picked and shipped in accordance with the shipping dates promulgated. It does not say that they *may* market their avocados without further inspection by the states, if they comply with the shipping dates established by the Federal Order. When the Congress of the United States means to exert its constitutional supremacy thus, it is able to say so in clear and explicit terms (See: Title 21 U.S.C. § 121).

The Federal law does not cover the whole field of interstate shipment of avocados. It would be lawful to raise avocados in Texas or Louisiana and ship them into California without complying with Florida Avocado Order No. 69, or any similar Federal order.[8] California avocados may be shipped to any state of the United States without complying with Florida Avocado Order No. 69, or any similar order.

California consumers are not given complete protection from the marketing of immature avocados by any Federal law or order. For all that the Federal law declares, avocados grown in any state but Florida may

[8] At present, no state of the United States, excepting Florida and California, raises avocados in significant quantity.

be sold in California without any standards designed to insure maturity. It is clear that insofar as California forbids the marketing of avocados with less than 8% oil content grown anywhere but in Florida, the California law is not in conflict with Federal law or regulations. Nor does it directly conflict with the explicit terms of such law or regulations, even when applied to Florida-grown avocados.

California has lawfully applied an 8% oil content test to avocados marketed by her own producers, which may be applied to any state not covered by the Federal Order. If the implication of Federal preemption of the field is read into Florida Avocado Order No. 69 and the Act under which it was issued, Florida producers alone will be privileged to avoid compliance with that test. Such an implication should not lightly be made (*Cloverleaf Co. vs. Patterson*, 315 U.S. 148). Congress, not having covered the whole field of interstate transportation of avocados, has left a wide field for the protection of consumers by the states by the appropriate exercise of the state police power (See: *Reid vs. Colorado*, 187 U.S. 137). The case would be different if the Federal Government had established a complete and uniform regulatory scheme which covered the whole problem (See: *Oreg.-Washington Co. vs. Washington*, 270 U.S. 87), but this the Congress has not done.

Plaintiffs derive some comfort from the case of *Mintz vs. Baldwin, supra.* In that case, the granting of a Federal certificate would have prevented the application of state inspection requirements, only because the Federal law there interpreted expressly so stated.

In *Cloverleaf Co. vs. Patterson, supra,* it was declared that where a Federal statute does not in specific terms prohibit state action, it must be clear that the Federal provisions are inconsistent with those of the state, before prohibition of state action may be inferred. It was further held that the Federal Government had established its own exclusive regulation of the manufacture of the product there involved, to the exclusion of state regulation of such manufacture. However, it was stated that if the finished product were offered for sale in a state, it would be subject to the pure food laws of that state. To infer that the California 8% oil content requirement is not applicable to Florida avocados because of Florida Avocado Order No. 69, this Court would be required to overrule *Cloverleaf Co. vs. Patterson, supra.* This, the Court has neither the power nor the inclination to do.

Both the State and the Federal requirements may be, and are being, enforced, without any clash between the two authorities. We are enjoined by the highest authority against seeking out conflict between state and Federal regulation, unless such conflict clearly exists *(Huron Cement Co. vs. Detroit, supra).*

We conclude that plaintiffs cannot prevail in this case, upon the merits thereof. The California law which plaintiffs have called in question is not in conflict with any provision of the United States Constitution, or with any Federal law or regulation.

IT IS, THEREFORE, ORDERED that plaintiffs take nothing by this action, and that judgment herein be, and it is, rendered against plaintiffs and in favor of the defendants.

**AND IT IS FURTHER ORDERED** that defendants prepare findings of fact and conclusions of law, a form of judgment, and all other documents necessary for the full and complete disposition of this case in accordance with this Memorandum and order, and lodge them with the Clerk of this Court pursuant to the applicable rules and statutes.

DATED: July ___, 1961

HOMER T. BONE
Senior Judge, United States Court of Appeals for the Ninth District.

LOUIS E. GOODMAN
Chief Judge, United States District Court for the Northern District of California.

SHERRILL HALBERT
United States District Judge

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

## ORDER RE PLAINTIFFS' MOTION TO SUBSTITUTE AND RULING ON EVIDENCIARY MATTERS

**Filed September 21, 1961**

The above entitled action came on for trial on February 7 and 8, 1961, on the application of plaintiffs for permanent injunction, and the Court having reserved ruling on certain motions and evidenciary matters at the trial pending the filing of written argument of the parties, and written argument having been duly filed and considered by the Court, and the Court being fully advised, now therefore it is ORDERED:

1. Charles Paul, Director of Agriculture of the State of California, is substituted as a party defendant in the place of William E. Warne;

2. The depositions of David M. Biggar, Roy W. Harkness, Harold E. Kendall, Fred Piowaty and R. M. Wimbish, are not admitted into evidence but have been considered by the Court as an offer of proof by plaintiffs;

3. Plaintiffs' exhibits for identification 1 through 26, are not admitted into evidence, but have been considered by the Court as an offer of proof by the plaintiffs;

4. The Court reserves to defendants the right to introduce rebutting evidence at a further hearing should it be determined upon appeal and remand that

the plaintiffs' offer of proof described in paragraphs 2 and 3 herein should have been admitted into evidence;

5. Defendants' exhibits A, B, C, D, E and F are admitted into evidence, plaintiffs having raised no objection thereto.

Dated: September 20, 1961

HOMER T. BONE
United States Circuit Judge

* See note below
United States District Judge

SHERRILL HALBERT
United States District Judge

* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign this Order.

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

**Filed September 21, 1961**

The above entitled action came on regularly for trial on February 7 and 8, 1961, before the Court, sitting without a jury, a jury having been waived, Isaac E. Ferguson appearing for plaintiffs, and John Fourt, Deputy Attorney General, State of California, appearing for defendants, and evidence both oral and documentary having been introduced and the cause submitted for decision, makes the following findings of fact and conclusions of law in accordance with its memorandum opinion filed July 12, 1961.

## FINDINGS OF FACT

1. Plaintiff Florida Lime and Avocado Growers, Inc., is a corporation which was duly incorporated by the State of Florida on April 6, 1956; plaintiff South Florida Growers Association, Inc., is a corporation which was duly incorporated by the State of Florida on April 29, 1953.

2. The defendant Charles Paul is Director of Agriculture, State of California, having held such office since February 1, 1961; the defendant Stanley Mosk is Attorney General, State of California, having held such office since January 5, 1959; the defendant Edmund G. Brown is Governor, State of California, having held such office since January 5, 1959.

3. Avocados of all varieties grown in the United States are picked for shipping and commercial marketing in a hard inedible state; if picked when immature, the fruit will shrivel, will become rubbery in texture, and will be bitter in taste and useless as food; if picked when mature, the fruit will soften into palatable, edible fruit; consumers and retail grocers cannot easily determine whether a hard avocado is mature so that it will soften into a palatable, edible fruit.

4. There is a temptation for growers to pick avocados in an immature state in the early portion of the avocado growing season when avocados are in short supply and the market price is high.

5. Other than water, oil is the chief constituent of avocados and the percentage of oil increases from the time of the beginning growth of the fruit on the tree to a maximum during the maturity of the fruit, and is the best available index of maturity of the fruit.

6. In order to assure consumer satisfaction and demand, it is desirable to establish minimum standards by which it can be determined whether an avocado is mature at the time of picking. A standard requiring a minimum of 8% of oil in an avocado before it may be marketed is scientifically valid as applied to hybrid and Guatemalan varieties of avocados grown in Florida and marketed in California.

7. Avocados grown in Florida can be grouped into three classifications:

(a) Those varieties which trace their origin to parent trees in the West Indies;

(b) Those varieties which are hybrids developed from varieties originating in the West Indies and varieties originating in Guatemala; and

(c) Those varieties which trace their origin to parent trees in Guatemala.

8. The West Indian varieties grown in Florida are of declining commercial importance, and the volume of Florida commercial shipments of the West Indian varieties have dropped from approximately 20% of total Florida commercial shipments in the 1955-56 shipping season to approximately 12% in the 1959-60 shipping season.

9. Hybrid and Guatemalan varieties in the 1959-60 shipping season constitute approximately 88% of total Florida commercial shipments, and are of increasing commercial importance as new Florida plantings of these varieties come into production.

10. The West Indian varieties have such poor shipping qualities and short retail store shelf-life that it is not commercially feasible to transport such varieties across the continent to California, even in the absence of the California 8% oil content statute.

11. The California 8% oil content requirement is effective in keeping off the market immature avocadoes of the varieties grown in California and of the hybrid and Guatemalan varieties grown in Florida; the varieties of avocados grown in California and the hybrid and Guatemalan varieties grown in Florida attain or exceed 8% oil content while in a prime commercial marketing condition which assures that said avocados will soften into palatable, edible fruit.

12. Neither the plaintiff Florida Lime and Avocado Growers, Inc., nor the plaintiff South Florida Grow-

ers Association, Inc., marketed or attempted to market, avocados in California during either the fiscal year ending March 31, 1959, or ending March 31, 1960; no proof was made that either plaintiff marketed, or attempted to market, any avocados in California from March 31, 1960, to the date of trial.

13. Plaintiffs have neither suffered nor been threatened with irreparable injury.

## CONCLUSIONS OF LAW

1. This action seeks to enjoin the enforcement of a state law upon the ground of unconstitutionality and plaintiffs' application for such an injunction was properly heard before this three judge court under 28 U.S.C. 2281.

2. The Court has jurisdiction of the subject matter of this suit and of the parties.

3. Plaintiffs' evidence fails to establish a case within the equity jurisdiction of this Court.

4. Section 792, California Agricultural Code, is consistent with the federal Agricultural Marketing Agreement Act of 1937, and with the marketing regulations for avocados grown in South Florida issued by the Secretary of Agriculture thereunder.

5. Section 792, California Agricultural Code, is consistent with the commerce clause of the United States Constitution, Article I, Section 8, Clause 3, and with the equal protection clause of Section 1 of the Fourteenth Amendment thereto.

6. That the enforcement of Section 792, California Agricultural Code, and the regulations promulgated

pursuant thereto against plaintiffs, are constitutional and valid.

7. Defendants are entitled to judgment that plaintiffs take nothing; that plaintiffs' request for injunction be denied; that the action be dismissed on the merits; and that the defendants recover of the Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., their costs of action.

Judgment is hereby Ordered to be entered accordingly.

Dated: September 20, 1961.

HOMER T. BONE
United States Circuit Judge

* See Note Below
United States District Judge

SHERRILL HALBERT
United States District Judge

* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign these Findings of Fact and Conclusions of Law.

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

[Title omitted]

## JUDGMENT

### Entered September 22, 1961

The above entitled action came on regularly for trial on February 7 and 8, 1961, before the Court, sitting without a jury, a jury having been waived, Isaac E. Ferguson appearing for plaintiffs, and John Fourt, Deputy Attorney General, State of California, appearing for defendants, and evidence both oral and documentary having been introduced and the cause submitted for decision and the Court having heretofore made and caused to be filed herein its written findings of fact and conclusions of law and being fully advised, it is ORDERED:

1. Plaintiffs take nothing;

2. Plaintiffs' request for permanent injunction is denied;

3. The action is dismissed on the merits;

4. Defendants recover of the Florida Lime and Avocado Growers, Inc., and South Florida Growers Association, Inc., their costs of action.

Dated: September 20, 1961.

HOMER T. BONE
United States Circuit Judge

* See note below
United States District Judge

SHERRILL HALBERT
United States District Judge

* The Honorable Louis E. Goodman died September 15, 1961, and is, therefore, unable to sign this Judgment.

Entered in Civil Docket—September 22, 1961 . . .

## APPENDIX B

### California Agricultural Code, Section 784:

"It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts, or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter."

### California Agricultural Code, Section 785:

"Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where

and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such consent, then the enforcing officer shall proceed as provided hereinafter.

If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified

petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of such report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into the court for the owner."

**California Agricultural Code, Section 785.6:**

"Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such non-complying fruits, nuts and vegetables shall be the current market value of the lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture Fund."

**California Agricultural Code, Section 792:**

"Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

"'Defect' includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

"All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

**California Agricultural Code, Section 831:**

"The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars ($50) nor more than five

hundred dollars ($500), or by imprisonment in the county jail for not more than six months, or by both."

**California Administrative Code, Title 3, Section 1366.2:**

*"Disposition at Inspection Stations of Lots or Loads Which Fail to Comply.*

(a) Produce which fails to comply and which has originated in California may go to a location in California (not out-of-state) under proper written authorization of the enforcement officer, provided it goes to a specified person or firm at that location, and that legal disposition at destination is performed under the direction of an enforcement officer at destination.

(b) Produce which fails to comply, and which originated outside California, may go to an out-of-state location; (1) if the lot or load returns to an out-of-state destination, or (2) proceeds through California, without unloading, to an out-of-state destination; in these two instances reconditioning or remarking is not necessary. However, if such load or lot of produce is to proceed to a California destination, it may do so only under proper written authorization of the California enforcement officer, and provided the destination is a specified person or firm at a California location, and that legal disposition at destination is performed under the direction of an enforcement officer at said destination.

In the case of (2) above of this section, such load or lot may be transported through California only under proper written authorization of the California enforcement officer, and provided an enforcement officer at the border station at the exit location is notified.

(c) A rejected lot or load may be reconditioned or re-marked, whichever is necessary to provide compliance, at the station, provided this is accomplished within a reasonable time specified by the enforcement officer, and when reconditioned, the lot is again submitted for inspection."

**California Administrative Code, Title 3, Section 1397.6:**

"*Avocados, Sample for Maturity Test.* The number of containers to be selected from any lot of avocados for the purpase of making a maturity test shall be as follows:

| *Amount* | *Sample Containers* |
|---|---|
| 50 containers or less | 2 |
| 51 to 100 | 3 |
| 101 to 200 | 4 |
| 201 to 300 | 5 |
| 301 to 400 | 6 |
| 401 to 500 | 7 |
| 501 to 800 | 9 |
| 800 and up | 10 |

From each sample container select the least mature appearing avocado, provided the sample for testing shall be at least 5 fruits; if there are less than 5 containers as the number of containers required, more than 1 avocado will need to be selected from some of the containers.

From the sample fruits selected for testing, individually test the 3 least mature appearing avocados. When 2 of these 3 tests are 8 percent oil or better, and 1 of the tests shows less than 8 percent but not below 7.5 percent, 2 additional least mature appearing avocados from the sample shall be tested.

In order to allow for variations incident to the sampling and testing procedure, no lot shall be considered as failing to meet the maturity requirements when only 1 avocado of the sample tests less than 8 percent oil, provided said low-test fruit does not test below 7.5 percent oil, and the other fruits in the sample each show 8 percent oil or better.

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